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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS GUZMAN GARZA, Defendant and Appellant.	A147787 (City & County of San Francisco Super. Ct. No. 219283)

Carlos Guzman Garza was convicted of an array of crimes arising from cosmetic medical procedures he performed on nine women, two of whom sustained great bodily injury, while he falsely posed as a physician or physician's assistant. He was also convicted of sexual offenses against two of his victims.

Guzman Garza raises four discrete challenges to his conviction. He asserts: (1) his convictions for assault and battery must be reversed because the victims consented to the procedures he performed on them; (2) the evidence was insufficient to support a conviction for his sexual penetration of victim Miriam P.; (3) his convictions for battery and sexual battery as to Miriam P. must be reversed because they were lesser included offenses of sexual penetration; and (4) the court erred when it admitted evidence of an uncharged sexual assault pursuant to Evidence Code section 1108.

We reverse Guzman Garza's conviction for misdemeanor battery as to Miriam P. because simple battery is a lesser included offense of sexual penetration. We also order a limited remand for the sentencing court to clarify the amount of the restitution and parole

revocation restitution fines imposed. Guzman Garza's remaining contentions are meritless, so in all other respects we affirm the judgment.

BACKGROUND

Guzman Garza was charged by information with 11 counts of practicing medicine without a license (Bus. & Prof. Code, § 2052, subd.(a)), four counts of false personation (Pen. Code, § 529[1]), three counts of unauthorized use of personal identifying information (§ 530.5), nine counts of assault with force likely to produce great bodily injury (§ 245, subd. (a)(1), two counts of battery with serious bodily injury (§ 243, subd. (d)), nine counts of grand theft (§ 487, subd. (a)), one count of sexual battery (§ 243.4, subd. (e)(1)), three counts of forcible sexual penetration (§ 289, subd. (a)(1), three counts of sexual penetration of an unconscious person (§ 289, subd. (d)), one count of sexual penetration of an intoxicated person (§ 289, subd. (e)), two counts of sexual battery under guise of professional purpose (§ 243.4, subd. (c), and one count each of oral copulation of an unconscious person (§ 288a, subd. (f)), oral copulation of a person prevented from resisting by intoxication (§ 288a, subd. (i)), forcible rape (§ 261, subd. (a)(2)), rape of a person prevented from resisting by intoxication (§ 261, subd. (a)(3), and rape of an unconscious person (§ 261, subd. (a)(4)). The information also alleged pursuant to section 12022.7, subdivision (a) that Guzman Garza inflicted great bodily injury on three of his victims.

Several charges were dismissed during trial. The jury found Guzman Garza not guilty on five counts, hung on five others (as to which a mistrial was declared), and returned guilty verdicts on the remaining counts, or lesser included offenses, and the bodily injury allegations. Guzman Garza was sentenced to a total term of 20 years in prison. His appeal is timely.

We will address the relevant evidence as necessary in the context of the specific issues raised on appeal.

[1] Unless otherwise indicated, further statutory citations are to the Penal Code.

DISCUSSION

I. Consent Is Not a Defense to the Assault and Battery Charges

Guzman Garza contends he should not have been convicted of assault, battery, and assault by means of force likely to produce great bodily injury for performing unauthorized buttock and breast augmentations, liposuctions, facelifts, and other procedures because, he maintains, his victims consented to the treatments. He acknowledges that he fraudulently induced their consent by posing as a doctor, but contends that only "fraud in the fact," not fraud in the inducement, can legally vitiate consent. Here, he argues, there was no "fraud in the fact" because the procedures he performed were the exact procedures his victims agreed to undergo. His contention is meritless.

People v. Stuedemann (2007) 156 Cal.App.4th 1, 6-7 (*Stuedemann*) explains the distinction between these two kinds of fraud in the context of consent. "[I]n fraud in the fact, the victim is fraudulently induced to consent to the doing of act X; the perpetrator of the fraud, in the guise of doing act X, actually does act Y; in fraud in the inducement, the victim is fraudulently induced to consent to the doing of act X and the perpetrator of the fraud does commit act X. [¶] Fraud in the fact, it has been said, vitiates consent. [Citation.] It appears equally reasonable to say that where there is fraud in the fact, there was no consent to begin with. Consent that act X may be done is not consent that act Y be done, when act Y is the act complained of. [¶] On the other hand, fraud in the inducement does not vitiate consent. [Citation.] "[T]he basic common law rule [is] that . . . the fact that consent is obtained through misrepresentation will not supply the essential element of nonconsent.' " (*Ibid*.) "Thus, the concept of fraud in fact appears limited to those narrow situations in which the victim consented to the defendant's act but . . . believed the essential characteristics of the act consented to were different from the characteristics of the act the defendant actually committed." (*Ibid*.)

We have no difficulty concluding that the "essential characteristics" of the acts Guzman Garza's victims consented to were substantially different from the procedures he performed. (*Stuedemann*, *supra*, 156 Cal.App.4th at p. 7; see *Rains v. Superior Court*

(1984) 150 Cal.App.3d 933, 940 (*Rains*) [deceit as to the lack of professional capacity of the person effecting the purported therapeutic contact vitiates consent].) Here, Guzman Garza's victims agreed to have medical procedures performed by a person they understood to be a licensed physician who was qualified to perform them. Instead, they were subjected to dangerous surgeries and other physically invasive procedures performed by an individual lacking any of the qualifications required for the practice of medicine. "[F]raud as to the identity of the person making contact or the true relation between the parties may vitiate consent because the offensive nature of the contact is altered according to the identity or capacity of the actor in relation to the person subjected to contact; e.g., contact by a physician for diagnostic or therapeutic purposes is unobjectionable to the patient, but identical contact by a person falsely professing to be a physician would be objectionable." (*Rains, supra,* 150 Cal.App.3d at pp. 938-939, citing Rest.2d Torts, § 55, com. b.) Just so. Guzman Garza's contention that his victims' consent gave him free reign to perform unlicensed medical procedures with impunity has no merit.[2]

II. Substantial Evidence Supports the Conviction on Count 42

Guzman Garza contends the evidence was insufficient to support his conviction on count 42 for sexually penetrating a victim who was prevented from resisting by an intoxicating or controlled substance. Specifically, he asserts there was no evidence the victim, Miriam P., "was ever prevented from resisting. Indeed, the evidence shows that she put up a valiant struggle against the alleged sexual assault." Not so.

A. Background

Miriam P. consulted with Guzman Garza and, believing his representation that he was a licensed physician, decided to have him perform a buttock augmentation. For her initial preparatory treatment Guzman Garza took Miriam to what looked like a hotel

[2] It may also be meritless for other reasons pointed out by the Attorney General, but we need not address those points in light of our determination that Garza's fraudulent impersonation of a medical professional vitiates any notion that his victims consented.

room, had her remove her clothes from the waist down, marked her body with his pen and gave her an injection

About two weeks later Guzman Garza picked Miriam up at her home. He told her he was going to perform the buttock augmentation procedure and gave her two pills he said were to help her relax. Minutes later, Miriam started to feel "very dizzy" and "went into a state where I was like out of it." As Guzman Garza drove, Miriam testified, "[her] body felt heavier and heavier. I felt like I was in a place where I shouldn't be."

They arrived at an office with a hospital-type bed and things that one would expect to see in a clinic. Miriam was "very, very dizzy" and "couldn't pay attention, focus on anything." At Guzman Garza's direction, she removed her clothing below the waist. Guzman Garza did not give her a gown to wear.

When Miriam was face down on the bed, Guzman Garza injected anesthetic in her buttock. It caused some numbness in the area. Miriam was still feeling "really bad" from the pills, "like I was up in the clouds." Guzman Garza took out a needle-like metal instrument about 8 to 12 inches long, inserted it in the skin above Miriam's buttock and started moving it to loosen the top layer of skin. This was very painful. Guzman Garza then used a syringe to implant gel in the opening he had created. Miriam experienced "[l]ots and lots of pain," but Guzman Garza told her to stop exaggerating and said the sensation was normal.

After Guzman Garza finished with the syringe, he touched Miriam's vaginal area and put his fingers inside her vagina. Miriam "asked him what his problem was, why he was doing that, and he told me that was something that I was going to like, to calm down." Guzman Garza continued touching her, then turned her over onto her back. At that point Miriam saw that his pants were down. She tried to push Guzman Garza away but he climbed on top of her with one knee on her chest and the other on the bed. Miriam was still very dizzy from the pills. She felt she had no strength and like "things were moving slowly" As she said "no," Guzman Garza put his penis near her mouth and said it was something she was going to like. Miriam resisted, but he inserted his penis into her

mouth, then into her vagina. Miriam was feeling even worse and "just had no strength left" to resist.

After a few minutes Guzman Garza got off of her. Miriam was uncertain how long the incident lasted because she was under the influence of medication.

The jury found Guzman Garza guilty of sexually penetrating Miriam P. when she was prevented from resisting by an intoxicating substance, in violation of section 289, subdivision (e). A mistrial was declared on additional charges of unlawful oral copulation and sexual intercourse related to these same acts after the jury was unable to reach a verdict on them.

B. Analysis

In reviewing the challenge to the sufficiency of the evidence, we examine the entire record in the light most favorable to the judgment to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Nelson* (2011) 51 Cal.4th 198, 210 (*Nelson*).) We "presume[] in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) If the circumstances reasonably justify the jury's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*Nelson, supra,* at p. 210.)

Pursuant to section 289, subdivision (e), "any person who commits an act of sexual penetration when the victim is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused, shall be punished by imprisonment in the state prison." A person is prevented from resisting within the meaning of section 289, subdivision (e) when "he or she is incapable of exercising the judgment required to decide whether to consent" to a sexual act, i.e., of "understand[ing] and weigh[ing] not only the physical nature of the act, but also its moral character and probable consequences." (*People v. Giardino* (2000) 82 Cal.App.4th 454, 458, 466 (*Giardino*); see *People v. Lujano* (2017) 15 Cal.App.5th 187, 192-193;see also *People v. Smith*

(2010) 191 Cal.App.4th 199, 203-205.) Accordingly, "the issue is not whether the victim actually consented to [the sexual activity], but whether he or she was capable of exercising the degree of judgment a person must have in order to give legally cognizable consent." (*Giardino, supra*, at p. 462.) "[A]lthough the statutory language suggests that the factual issue is whether the intoxicating substance prevented the victim from physically resisting, the correct interpretation focuses on whether the victim's level of intoxication prevented him or her from exercising judgment." (*Id*. at p. 466.)

According to Guzman Garza, there was *no* evidence, let alone sufficient evidence to sustain the conviction, that Miriam P. was prevented from resisting within the meaning of section 289, subdivision (e). He argues the evidence "conclusively demonstrates" that she was fully capable of resisting, and did so, because she verbally and physically tried to stop him when he touched her vagina. We disagree. True, Miriam's testimony could have allowed the jury to draw that conclusion, but the jury could also have reasonably found that the medication she had ingested made her incapable of exercising the judgment necessary for legally cognizable consent. Miriam testified that she experienced severe dizziness and became unable to focus after she took the pills. She felt weak, "out of it," and increasingly heavy, like she was "up in the clouds." Events seemed to be happening slowly. The jury could reasonably deduce that the effects of the medication Guzman Garza administered rendered Miriam incapable of exercising the judgment required for consent to sexual activity, whether or not she verbally protested when he penetrated her or was able to shake off her medication-induced stupor to resist his continued assaults. Accordingly, we may not disturb the verdict. (See *Nelson, supra*, 51 Cal.4th at p. 210.)

The cases Guzman Garza cites for his contrary position do not persuade us. In *Stuedemann*, *supra*, 156 Cal.App.4th 1 and *People v. Lyu* (2012) 203 Cal.App.4th 1293 (*Lyu*), the defendants were convicted of sexual penetration and oral copulation of an unconscious person pursuant to subdivisions (f) and (d) of section 289. Both convictions were reversed because the evidence established that the victim was not unconscious (i.e., unaware) of the sexual nature of the defendant's acts. (*Stuedemann, supra*, at p. 8; *Lyu*,

supra, at pp. 1300-1301.) Here, Guzman Garza was not charged with a sexual offense against an unconscious victim. The relevant question, rather, was whether Miriam was prevented from resisting by an intoxicating substance within the meaning of section 289, subdivision (e) and *Giardino, supra,* 82 Cal.App.4th 454. The jury reasonably found that she was.

III. Lesser Included Offenses

Guzman Garza asserts his convictions for misdemeanor sexual battery (§ 243.4 subd. (e)(1), count 40) and battery (§ 242, count 41) of Miriam must be reversed because both crimes are lesser included offenses of sexual penetration of a person prevented from resisting by an intoxicating substance (§ 289, subd. (e), count 42). He is correct with respect to simple battery, but not as to sexual battery.

A. Background

The prosecutor explained in closing argument that counts 40, 41 and 42 were all based on Guzman Garza's digital penetration of Miriam, but that each offense had different elements. The prosecutor argued: "Count 40 is the penetration by force. We've talked about that. That's the digital penetration of her. It was his first act. [¶] Count 41 is penetration by a person unconscious of the nature of the act. That's the same act, but he also accomplished it by force and by the fact that she thought she was in the middle of a medical procedure. [¶] Count 42 is the same thing. Digital penetration by intoxication. Again, all for the same thing, but he did it in three different ways. You can commit all three of those crimes with one act. You can use force. You can intoxicate someone. And you can make them think that it's all part of a medical procedure, which is exactly what happened here."

As noted, the jury convicted Guzman Garza of sexual penetration of an intoxicated person. (§ 289, subd. (e), count 42.) On count 40 the jury found him not guilty of sexual penetration by force, but guilty of misdemeanor sexual battery (§ 243.4, subd. (e)(1)) as a lesser included offense. On count 41 the jury found Guzman Garza not guilty of sexual penetration of an unconscious person, but guilty of misdemeanor battery (§ 242). The

court sentenced him to eight years on count 42 and six months each on counts 40 and 41, but stayed the misdemeanor sentences pursuant to section 654.

B. Analysis

1. Necessarily Included Offenses

"In general, a person may be convicted of, although not punished for, more than one crime arising out of the same act or course of conduct." (*People v. Reed* (2006) 38 Cal.4th 1224, 1226.) However, "a judicially created exception to the general rule. . . 'prohibits multiple convictions based on necessarily included offenses.' " (*Id*. at p. 1227.) " '[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' " (*Ibid*.)

We employ two tests to determine whether an uncharged offense is necessarily included within a charged offense: the "elements" test, and the "accusatory pleading" test. "Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former. (*People v. Reed*, *supra*, 38 Cal.4th at pp. 1227-1228; *People v. Lopez* (1998) 19 Cal.4th 282, 288; compare *People v. Sloan* (2007) 42 Cal.4th 110, 118-119 [accusatory pleading test does not apply in deciding whether multiple conviction of *charged* offenses is proper].) Here, we note, there is no effective difference between the result yielded under either of the two tests because the language of the information tracks the statutory language.

Our review is de novo. (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

2. Sexual Battery

For purposes of section 289, " 'Sexual penetration' " is defined as "the act of causing the penetration, however slight, of the genital or anal opening of any person . . . for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." (§289, subd. (k)(1).) A " '[f]oreign

object, substance, instrument, or device,' " in turn, is defined as including "any part of the body, except a sexual organ." (§ 289, subd. (k)(2).)

Section 243.4, subdivision (e)(1), sexual battery, penalizes "[a]ny person who touches an intimate part of another person, if the touching is against the will of the person touched and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse." " '[T]ouches,' " in this context, means "physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim." (§ 243.4, subd. (e)(2).) Thus, "[t]he sexual battery statute does not encompass touching by a foreign object other than the offender's body. In contrast, sexual penetration . . . is not limited to physical contact and can be broader: Penetration may be caused 'by any foreign object, substance, instrument, or device, or by any unknow object.' (§ 289, subd. (k)(1).) Because the . . . sexual penetration statute encompasses different types of contact than the sexual battery statute, it is possible to commit the greater without committing the lesser (e.g., where penetration is accomplished by means other than a part of the perpetrator's body)[.] Sexual battery is therefore not a lesser included offense of . . . sexual penetration under the statutory elements test." (*People v. Ortega* (2015) 240 Cal.App.4th 956, 967, rejected on a different point in *People v. Macias* (2018) 26 Cal.App.5th 957, 964-965.)

2. Simple Battery

We reach a different conclusion as to the conviction for simple battery. Section 242 defines battery as "any willful and unlawful use of force or violence upon the person of another." " ' " 'It has long been established, both in tort and criminal law, that 'the least touching' may constitute battery. In other words, force against the person is enough, it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark.' [Citation.] [¶] 'The "violent injury" here mentioned is not synonymous with "bodily harm," but includes any wrongful act committed by means of physical force against the person of another, even although [sic] only the feelings of such person are injured by the act.' [Citation.]" [Citation.]' [Citations.] Thus, '[a]ny harmful or offensive touching constitutes an unlawful use of force or violence' for purposes

of Penal Code section 242. [Citations.] 'Even a slight touching may constitute a battery, "if it is done in a rude or angry way." ' " (*James v. State of California* (2014) 229 Cal.App.4th 130, 137-138.) Under the broad statutory definition of battery, we agree with Guzman Garza that an act of unlawful sexual penetration as defined by section 289, subd. (k)(1) cannot be committed without also committing battery. (See *Stuedemann, supra,* 156 Cal.App.4th at pp. 9, fn. 6 [misdemeanor battery is a lesser included offense of sexual penetration of an unconscious person]; Bench Notes to CALCRIM Nos. 1047, 1048 (2018 ed. pp. 782, 785.) Accordingly, the conviction on count 41 must be reversed. (*People v. Sanders* (2012) 55 Cal.4th 731, 736.)

IV. Evidence of Uncharged Offenses

Guzman Garza contends the trial court violated his due process right to a fair trial and abused its discretion when it admitted evidence of uncharged offenses against victim Marilyn C. pursuant to Evidence Code section 1108. These contentions, too, are unpersuasive.

A. Background

Guzman Garza performed a buttocks augmentation on Marilyn C. The procedure involved a series five or six injections of a "filler" substance over about a month. To prepare her, Guzman Garza had Marilyn C. remove her pants and underwear and Guzman Garza applied an anesthetic cream or injection to her buttocks. She normally fell asleep during the treatments.

While he injected the filler, Guzman Garza would touch the outside of Marilyn C.'s vagina. The touching was "really sustained," not quick. Guzman Garza said this was a necessary part of the procedure. On another occasion he digitally penetrated her vagina while he applied a cream for a vaginal infection. Again, he told her it was part of the medical procedure.

The prosecution introduced two photographs depicting a finger inserted into a vagina. The pictures were taken with Guzman Garza's camera the same day he used it to take identifiable photographs of Marilyn C. Marilyn could not say whether she was the person depicted in the two photographs and was not aware of having been penetrated

during her procedures, but it could have happened while she was asleep. A forensic analysis of the thumb drive where the two photos were found established that they were taken 14 seconds apart and 35 minutes after Guzman Garza used the camera to photograph Marilyn.

The trial court ruled the evidence of the uncharged offenses was admissible under Evidence Code section 1108 and was not unduly prejudicial under Evidence Code section 352. The jury was instructed with CALCRIM No. 1191 on the use of uncharged sex offense evidence, as follows: "The People presented evidence which the People contend shows that Mr. Garza committed the crimes of Sexual Battery, Sexual Penetration of a Person Unconscious of the Nature of the Act, and Sexual Penetration of an Intoxicated Person all relating to Marilyn [C.]. These crimes were not charged in this case. These crimes are defined for you in these instructions.

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

"If the People have not met this burden of proof, you must disregard this evidence entirely.

"If you decide that the defendant committed the uncharged offense, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit Sexual Penetration of an Intoxicated person in Count 42 (Miriam [P.]), Sexual Penetration of an Unconscious Person in Counts 16 (Mayra [A.]), 23 (Norma [P.]) and 41 (Miriam [P.]), or Sexual Battery in Counts 13 (Mayra [A.]) and 24 (Norma [P.]) as charged here. If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Sexual Penetration of an Intoxicated Person, Sexual Penetration of

an Unconscious Person or Sexual Battery. The People must still prove each charge and allegation beyond a reasonable doubt.

Do not consider this evidence for any other purpose, including any charges for sexual acts by force."

B. Analysis

Evidence Code section 1108 permits the trier of fact to consider evidence of uncharged sexual offenses " ' "as evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense." ' "[3] (*People v. Falsetta* (1999) 21 Cal.4th 903, 912 (*Falsetta*).) Guzman Garza argues Evidence Code section 1108 is facially unconstitutional because it permits evidence of a defendant's prior crimes to be admitted to show his or her propensity to commit such crimes again. He acknowledges that the Supreme Court upheld section 1108 against just such a due process challenge in *Falsetta*, but raises the issue to preserve it for federal review. We reject the assertion, as we must. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Guzman Garza also contends the court should have excluded the evidence concerning Marilyn C. pursuant to Evidence Code section 352. We review the ruling to admit the evidence for abuse of discretion (*Falsetta*, *supra*, 21 Cal.4th at pp. 917-918), and find none. First, the evidence was probative of Guzman Garza's propensity to commit the similar charged offenses against Miriam P., Mayra A., and Norma P.[4] "With the enactment of section 1108, the Legislature 'declared that the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness.' " (*People v. Soto* (1998) 64 Cal.App.4th 966, 983.) Indeed, as the Supreme

[3] "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd.(a).)

[4] The jury acquitted Garza of the sexual offenses concerning Norma P.

Court has observed, " '[s]uch evidence "is [deemed] objectionable, not because it has no appreciable probative value, but because it has too much." ' " (*Falsetta, supra,* 21 Cal.4th at p. 915; *People v. Soto, supra,* at p. 989-990.)

We are also unpersuaded that the evidence was unduly prejudicial. "[T]he test for prejudice under Evidence Code section 352 is not whether the evidence in question undermines the defense or helps demonstrate guilt, but is whether the evidence inflames the jurors' emotions, motivating them to use the information, not to evaluate logically the point upon which it is relevant, but to reward or punish the defense because of the jurors' emotional reaction." (*People v. Valdez* (2012) 55 Cal.4th 82, 145.) Guzman Garza asserts Marilyn C.'s testimony was unacceptably inflammatory because it "made him out to be a serial sex offender," but it is not apparent why the testimony of four victims, but not three, would so outrage the jury that they would convict him simply because they believed he had a propensity to commit sex offenses. In any event, Marilyn C.'s testimony was no more inflammatory than that of the other women who testified Guzman Garza sexually assaulted them. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [potential for prejudice was diminished because the uncharged acts evidence "was no stronger and no more inflammatory than the testimony concerning the charged offenses"]; *People v. Mullens* (2004) 119 Cal.App.4th 648, 660 [victim's testimony about inappropriate touching was not unduly prejudicial given explicit testimony about the defendant's alleged multiple lewd acts involving another victim].) Finally, Guzman Garza's claim of undue prejudice cannot readily be squared with the fact that, although the jury convicted him of some of the sexual charges, it either acquitted him or was unable to reach a verdict as to others. The court's ruling was well within its discretion.

V. Restitution and Parole Revocation Restitution Fines

Both parties assert remand is necessary to clarify the amount of the restitution and parole revocation fines. We agree.

At sentencing, the court ordered Guzman Garza to "pay a restitution fine of $10,900, representing $300 times 33 felony convictions, and $1,000 total for nine misdemeanor convictions, pursuant to Penal Code section 1202.4." The court also

imposed a parole revocation restitution fine "in the amount of $9,900," stayed pursuant to section 1202.45 "unless and until [Guzman Garza's] parole is revoked."

The fines are inconsistent with statutory authority. First, section 1202.4 permits a maximum restitution fine of $10,000. (§ 1202.4, subd. (b)(1).)[5] The restitution fine imposed here exceeds that maximum by $900. Second, section 1202.45, subdivision (a) provides that the parole revocation restitution fine must be in the same amount as the restitution fine imposed under section 1202.4. Guzman Garza's $9,900 parole revocation restitution fine does not comply with this requirement. Unfortunately, the abstract of judgment and minute order further muddy the waters. The abstract reflects "$10,900 per PC 1202.4(b)" and "$10,900 per PC 1202.45 suspended unless parole is revoked," while the trial court minutes appear to reflect the imposition of restitution and parole revocation fines "in the amount of $300." We are thus unable to harmonize the record as to the amount of fines imposed, so we must remand the matter to the trial court for clarification.

DISPOSITION

The conviction on count 41 is reversed and the case is remanded for the trial court to clarify and set the amount of the restitution and parole revocation fines in lawful measure. The judgment is affirmed in all other respects.

[5] Section 1202.4, subdivision (b) provides: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than three hundred dollars ($300) and not more than ten thousand dollars ($10,000). If the person is convicted of a misdemeanor, the fine shall not be less than one hundred fifty dollars ($150) and not more than one thousand dollars ($1,000). [¶] (2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted."

_____
Siggins, P.J.

We concur:

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Jenkins, J.

_____
Petrou, J.